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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 137

RYAN STEVEDORING CO., INC.,

Petitioner,

v.

PAN-ATLANTIC STEAMSHIP CORPORATION;

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 157

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v.

Pan-Atlantic Steamship Corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of the Case

In 1949, a longshoreman named Palazzolo, in the employment of Ryan, a stevedoring company which is the petitioner here, was injured while he and other employees of Ryan were discharging a cargo of rolls of paper pulp aboard the S. S. Canton Victory, then lying at a pier in Brooklyn, N. Y.

The respondent, Pan-Atlantic, was the bareboat charterer of the vessel and, therefore, will be treated herein as the owner of the vessel.

Palazzolo sued Pan-Atlantic on the sole and exclusive theory that the stowage of rolls was improper. If proved, this would necessarily make the vessel unseaworthy as to her stow.

Ryan had actually stowed this cargo at Georgetown, S. C., so the case is an uncommon one where the same

stevedore both created the stow at one port and discharged the same cargo, which remained undisturbed in the interim; at another port.

Palazzolo proved to the satisfaction of a jury that at Georgetown, S. C., Ryan had failed to insert under the bottom rolls adequate pieces of wood or chocks which would prevent the rolls from coming loose, rolling uncontrolled at the time when the cargo was being discharged and striking Palazzolo. Thus, the vessel was found unseaworthy because of the improper stow. The jury fixed his damage at $75,000.

The Court of Appeals for the Second Circuit unanimously affirmed Palazzolo's judgment against Pan-Atlantic, on the ground that the latter had a non-delegable duty to provide him with a safe place in which to work and a seaworthy vessel. The Court decided that while indisputably Ryan had affirmatively created the stow which the jury had found improper and unseaworthy, that fact was no defense against Palazzolo, so far as Pan-Atlantic was concerned, because of the absolute and non-delegable character of the duty imposed by the law on shipowners.

Upon the affirmance, Palazzolo's judgment was paid and, thus, the issue between the injured longshoreman and the shipowner has been finally resolved. All of his legal rights have been fully satisfied and the petition for certiorari is a matter of no interest to the injured man.

While Palazzolo's action was pending against Pan-Atlantic, the latter sued Ryan (using procedurally Rule 14 of the Federal Rules of Civil Procedure) to procure indemnity for any damage Pan-Atlantic might sustain as the result of Palazzolo's action, if his recovery was based on the fact that the stowage at Georgetown, created by Ryan, was improper. One of the theories upon which this claim was based was that if Ryan's breach of its implied warranty to do a reasonably proper job of stowing the cargo caused the vessel to become unseaworthy and thus created a species of liability without real fault on the part

of Pan-Atlantic vis-a-vis Palazzolo, then Pan-Atlantic should have indemnity against Ryan for breaching its contract and causing Pan-Atlantic's obligation to come into being.

Although the question of indemnity between shipowner and stevedore is most commonly covered by contract provisions, Pan-Atlantic was compelled to seek common law indemnity because the contractual arrangements between Pan-Atlantic and Ryan were informal and unusual (R. 34, 35, 295-300). They consisted of two memoranda and two letters referring only to the price Ryan would receive for stevedoring vessels operating in the coastwise service of Pan-Atlantic (R. 36-42). This rare situation existed because Pan-Atlantic and Ryan were wholly owned subsidiary corporations of a common parent, namely, Waterman Steamship Corporation, which was "servicing" the vessel for Pan-Atlantic in the Port of New York at the time of the accident (R. 29, 48-54).

Ryan defended against Pan-Atlantic's claim for indemnity on the ground that Ryan, as Palazzolo's employer, had obtained insurance to cover its obligations *to Palazzolo* under the U. S. Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A. 901, *et seq.*) and thereby became legally incapable of any obligation of any description for anything *to Pan-Atlantic* (R. 20, 21).

Ryan tested the validity of that affirmative defense, which lies at the heart of the petition for certiorari, by motion for summary judgment (R. 30-42) which was denied by the District Judge (R. 43-45). The threadbare argument was repeated to the Trial Judge (Petition, 5) and the Court of Appeals for the Second Circuit (Petition, 15). Neither Court would dignify this desperate "defense" even by discussion in their opinions (111 F. Supp. 505; 211 F. 2d 277).

This case no longer presents any problem of Ryan's compensation insurance carrier as such, although that carrier, American Mutual Liability Insurance Co., may

well have another insured obligation which it seeks to avoid. The compensation carrier had a right under the law (33 U. S. C. A. 933) to recoup from Palazzolo's recovery what it had previously spent for medical expenses and compensation paid to Palazzolo. Such a judgment in the amount of $12,797.36 was entered in favor of the insurance company (R. 360, 361) and was fully paid upon the affirmance of Palazzolo's judgment by the Court of Appeals.

There was one basic issue of fact common to the separate disputes between Palazzolo and Pan-Atlantic and between Pan-Atlantic and Ryan, namely, whether the stow created by Ryan at Georgetown was reasonably safe. All claims were tried at the same time, Palazzolo's being tried to a jury and Pan-Atlantic's claim for indemnity against Ryan being left for decision by the Trial Court, if Palazzolo received a judgment. There was no dispute of fact between Ryan and Pan-Atlantic, the facts were stipulated by counsel (R. 295-302) and Ryan did not call any witnesses (R. 302).

The Trial Court denied the claim for indemnity because the vessel had a second mate aboard, watching the cargo being stowed during four of the twenty hours the vessel was being loaded at Georgetown and, in effect, the Trial Court held it was the vessel owner's obligation *as to the stevedoring corporation* (not an injured longshoreman) to see that the stevedore did that good, workmanlike job which it was paid to do (R. 358, 359). Actually, the uncontradicted testimony of the mate (quoted by the petitioner in fragmentary fashion at pages 6 and 7 of the petition) demonstrated that all five hatches were worked during loading at Georgetown (R. 240); the mate on watch would not spend all of his time in any particular hold and would be all over the vessel (R. 259); the mate had no authority to direct any of Ryan's men in the manner of loading the cargo and did not supervise the detail of the stow (R. 259, 260); there were proper chocks on the vessel and the dock (R. 260); the mate had seen Ryan's men use proper chocks

aboard the vessel from time to time during the loading of this cargo but it would not be possible for any mate who did not remain continuously in one hold to know whether, in fact, all of the rolls would be properly chocked, or if, indeed, they were chocked at all (R. 264). All of the witnesses on the subject were in harmony that once the bottom layer has been fully stowed, it is physically impossible for anyone to tell whether the rolls have been chocked or secured, or, if they have been secured, the nature of the material used (R. 91, 261, 262, 270).

The Court of Appeals reversed the erroneous decision of the District Court, referring to the admitted fact that "the improper stowage (was) the primary and active cause of the accident" (R. 372). Indeed, it was the *only* cause of the accident ever assigned by Palazzolo and the only cause which could possibly sustain Palazzolo's recovery. The Court said that "Ryan was obligated by implied contract to perform the work in a reasonably safe manner. This duty Ryan breached; * * *." The petition does not challenge either statement.

Grounds why the Cause should not be Reviewed

1. The facts here are peculiar and are not appropriate for the promulgation of rules to be generally applied. The issues presented by the petition are sham from a practical point of view. The petitioner's argument that Ryan's compliance with the U. S. Longshoremen's & Harbor Worker's Compensation Act insulates it from Pan-Atlantic's right of indemnity, based on Ryan's breach of contract, is specious. This has been discredited by every appellate court to which it has been presented. The petitioner does not claim, even obliquely, that there is any conflict among the decisions in the various courts of appeals on this matter.

2. The petitioner's stated understanding to the contrary (Petition 7) the issue of common law indemnity cannot be

of any importance peculiar to the "shipping industry." This common law principle is not maritime in character. Its origins, development and most frequent application are in terrene matters upon which this court has spoken authoritatively since at least 1896.

3. The petitioner's argument that there is no difference between the legal concepts of indemnity and contribution is based solely on rhetorical language, lacks substance and is totally erroneous.

4. The petitioner's threat that in the future it and its compensation insurance carrier will prevent the possibility of common law indemnity by violating the law and depriving injured longshoremen of their legal rights is as detestable as it will prove impossible.

5. The scope of appellate review by the court of appeals has in no way been made uncertain by its decision in this case, especially since there was no dispute of fact between Pan-Atlantic and Ryan and the latter called no witness, the facts having been stipulated by counsel (R. 295-302).

6. The decision by the Court of Appeals for the Second Circuit was fair, just and equitable as between Pan-Atlantic and Ryan, particularly considering the nature of the Trial Court's charge to the jury.

ARGUMENT

Under the peculiar facts of the case, Ryan's compliance with the U. S. Longshoremen's and Harbor Workers' Compensation Act is too obviously foreign to Pan-Atlantic's claim for indemnity based upon breach of contract by Ryan, to warrant the issuance of a writ of certiorari.

The case is odd in that one subsidiary corporation has sought and received indemnity from another subsidiary corporation and both are subsidiaries of a common parent.

Obviously the situation is unique because indemnity can accomplish nothing of value and is not sought in the usual case of subsidiaries. It would simply be taking money out of one pocket and putting it in another. That issue would hardly seem one justifying review by this Court.

The Record is silent on the question of insurance (other than Ryan's compensation insurance) but if one is to assume that "substantially all maritime risks are insured" (*Keen* v. *Overseas Tankship Corp.*, 194 F. 2d 515, 518, certiorari denied, 343 U. S. 966) then the real issue would be whether Ryan's insurance company or Pan-Atlantic's insurance company should ultimately bear the loss. If such be the issue here, again, the issue would not appear to be one warranting further consideration.

Leaving for later discussion the well-recognized legal right of Pan-Atlantic to have indemnity against Ryan, a case of this general nature at its inception presents two separate, distinct and unrelated lines of obligation, that is, Ryan, as an employer of Palazzolo, owed Palazzolo certain duties and Ryan, as a contractor with Pan-Atlantic, owed Pan-Atlantic certain other duties. Once one recognizes that basic fact, the heart of the petition is exposed as groundless and when one considers the factual relationship between Ryan and Pan-Atlantic, one realizes the issues tendered by the petition must really be sham.

Despite the patent fact, the petitioner refuses to recognize that Ryan's obligations to Palazzolo can have no possible effect upon its contractural obligations to others, such as Pan-Atlantic. The Record here demonstrates the obvious. When Palazzolo was injured in the course of his employment, Ryan owed to him a single and clear obligation, namely, to provide that Palazzolo receive the compensation benefits prescribed by law. This duty was absolute and unlimited by concepts of negligence or whose fault may have caused the accident or what caused it or whether Ryan was doing a good job or a poor one. Ryan procured insurance to satisfy its legal obligation to see

to it that Palazzolo received all of his rights in compensation. Palazzolo received those rights, had no cause for complaint against Ryan, never sued Ryan and, indeed, could not. Ryan thus satisfied the duties it owed to its employee, Palazzolo.

But what of Ryan's contract with Pan-Atlantic? Ryan had agreed to stow the cargo in a reasonably safe manner. Admittedly it breached its contract. Why should Ryan not be liable for breach of contract and pay as damages to Pan-Atlantic any loss it sustained, whether for damage to cargo, unnecessary detention of the vessel because of the poor stow, or judgments obtained against Pan-Atlantic by anyone injured by the stow? The argument that Ryan is not liable for *breach of contract to Pan-Atlantic* simply because it has satisfied its *compensation obligations to a Ryan employee*, is too patently absurd to warrant review here.

Running through numerous pages of the petition is the thought that some court, somewhere, has distorted or failed to recognize the clear language of the Longshoremen's and Harbor Workers' Compensation Act. No decision anywhere supports that conclusion. The language is clear and requires no interpretation in any fashion. The attempt to create confusion by argument where a statute is utterly plain is so singularly without merit, that although presented to the United States Court of Appeals for the Second Circuit, that Court, which handles all appeals in most meticulous fashion, simply ignored it. 33 U. S. C. A. 905 cannot be the subject of any honest doubt, and it is obvious to every court which has considered it, that it cannot be "construed". One cannot "interpret" the evident.

When the Longshoremen's and Harbor Workers' Compensation Act was under consideration before enactment, Congress had for solution a fundamental problem, namely, the relative rights and obligations of employer and employee. It was desired that there be enacted as Federal law a compensation statute analogous to the com-

pensation statutes then existing in many of the states of the United States. Indeed, the Federal Act is fashioned and modelled upon the New York State Workmen's Compensation Law. No one dreamed that any legislative body was doing anything other than to define, to create, or to modify employer-employee relationships. The language defining the liability of the employer is clear. It defines his obligation to his *employee* and no one else, other than those who stand in the shoes of the employee. Thus, the statute (33 U. S. C. A. 905) refers to the employee, his legal representatives, husband, wife, parents, dependents, next-of-kin, and anyone else claiming against the employer on account of the injury or death of an injured employee. It is difficult to conceive how Congress could have said more clearly that the rights of compensation are the exclusive remedy for an employee, his kin, assignees, or anyone else *who claims through him.*

Obviously, Pan-Atlantic does not claim *through* Palazzolo by subrogation or otherwise. Its claim is based upon the fact that Ryan breached its contract and, having breached its contract, should pay damages. The law has always implied that one who undertakes to do a job will do it well. This is not the result of any strained legal reasoning, but simply a matter of everyday common sense. Ryan was paid to stow the cargo properly. It did not do that, and because it failed to do the job in a workmanlike fashion, the vessel was rendered unseaworthy as to her stow and the vessel owner has been mulcted in damages. How can it be sensibly argued that because Ryan has satisfied its obligations in compensation to Palazzolo it is thus exonerated from the consequences of breaching its contract with Pan-Atlantic?

The petitioner can find no solace in searching the Congressional Record. (Petition 9, 10, 14, 15) and, in fact, admits that "these words (33 U. S. C. A. 905) are clear, unambiguous and unequivocal and no aids to legislative intent need be sought in this instance." (Petition 14) Where the Petitioner commits fundamental error is in

failing to appreciate the Act was designed exclusively to govern employer-employee relationships and, therefore, the Petitioner expresses incompletely, and in a vital matter, the purposes of the Act. At Petition 9, the Petitioner has written that Congress created under the Act a guaranteed compensation to an employee for injuries arising out of employment, regardless of any question of fault or negligence and there was created "an absolute, certain, exclusive and circumscribed liability on the part of the employer." The petitioner forgot to add the words: "to his employee."

The attempt to torture the "clear, unambiguous and unequivocal" language of the Act into a general release in favor of Ryan against the whole world for all of its acts, contracts, etc. is confessedly unreal, for the petitioner has written (Petition 20) that "the plain and obvious fact is that the Congress never contemplated and therefore had no intention in either direction respecting third party indemnity situations—this, prior to the passage of the Act, here involved, on March 4, 1927." Of course it did not have any "intention", because the problem of indemnity by contract with one not an employee is entirely alien to a workmen's compensation law. The legislators who passed the law would undoubtedly be amazed to hear it argued that employers buy with their compensation insurance not only the release of further liability to employees but as well a release of all obligations, by contract or otherwise, to the rest of the world.

The petitioner manifests concern over its "foregone conclusion that an injured longshoreman will bring action against the shipowner who in turn will implead the stevedore-employer and seek indemnity implied in law" when ever a longshoreman is injured in the stevedoring of a vessel (Petition 8). Unless groundless litigation is to be anticipated as a source of worry, the petitioner need not fret about common law indemnity so long as it does that good, workmanlike job it is paid by the shipowner to do. If Ryan had properly stowed the cargo at Georgetown

as it should have, this case never would have arisen. Its salvation from the horrors of indemnity lies in its own hands.

In similar vein, the petitioner thinks this Court's decision in *Alaska Steamship Company v. Petterson*, 347 U. S. 396, holding a vessel owner is liable to an injured longshoreman for defective gear supplied to a ship by a stevedoring company, may lead to a claim by the owner for indemnity from the stevedore. If the stevedore is bound by contract, express or implied, to supply good gear, but furnishes defective gear, so that the owner must pay damages to a man injured thereby (whether he be a member of the crew, longshoreman or business invitee) why should not the stevedore make the shipowner whole? There is nothing unfair or unconscionable about that.

The petitioner's alleged fears about general litigation involving indemnity are obviously more fancied than real. Shipowners and stevedores are businessmen, dealing with one another, in the ordinary case, by appropriate contract. Problems like indemnity are not approached by businessmen in ignorance or with despair or hopelessness. The question of indemnity can be covered by contract and usually is. For example, see *American Stevedores v. Porello*, 330 U. S. 446, 457. The contract decides a very simple question, namely, whether the stevedore's insurance company or the vessel owner's insurance company will ultimately pay the bill as between themselves, of course, leaving entirely unaffected all of the rights of an injured man as against vessel owner or stevedore.

The petitioner presents again the oft discredited argument that indemnity really amounts to a law suit against an employer by his employee, and that by using the practice of impleader, the shipowner is a "mere conduit through whom the injured employee-longshoreman recovers from his stevedore-employer." (Petition 10). Nothing could be further from the fact. The practice of impleader is but a procedure to avoid piecemeal litigation, so that while a case may present different legal issues between

different parties and many different facts and factors, any common question of fact need be tried but once. The shipowner, or one similarly situated, need not use this practice and where it is not used, the "conduit" allegation is most clearly exposed as the fallacy it really is. For example, see *George A. Fuller Co.* v. *Otis Elevator Co.*, 245 U. S. 489.

Let us assume that Palazzolo's action against Pan-Atlantic was not removed from the New York State court and Pan-Atlantic did not bring Ryan into the litigation by using the practice permitted by Section 193-a of the New York Civil Practice Act. Assume the case was tried to a jury which found Palazzolo was injured because the vessel was unseaworthy as to her stow, the rolls not having been adequately chocked at Georgetown. Who stowed the cargo would be of no interest to Palazzolo, or to Pan-Atlantic either, because the latter has a non-delegable duty to provide a seaworthy vessel. Assume Palazzolo received a judgment for $75,000 in the state court and Pan-Atlantic paid it. Has Palazzolo indirectly sued Ryan, his employer, or received anything directly or indirectly from Ryan? Pan-Atlantic's money has been paid, not Ryan's, so that the "conduit" theory is nonsense.

Assume further that Pan-Atlantic then sued Ryan in the federal court, there being diversity of citizenship, for breach of contract. This has nothing to do with Palazzolo. He has received payment of his judgment from Pan-Atlantic. In the subsequent litigation between Pan-Atlantic and Ryan, nothing could happen to affect either Palazzolo's right to recover or the quantum of his damage. His judgment had been paid and no question of his rights in compensation against Ryan ever did or could arise. The issue of breach of contract, whether expressed or implied, would be resolved one way or the other in the federal court litigation but certainly none could say Palazzolo had sued Ryan directly or indirectly or had obtained money from Ryan on the theory Pan-Atlantic was some type of "conduit."

The issues in the case as it was actually tried were not obscured by the interpleader. No more proof of the existence of separate issues need be adduced than to point out one set of issues was tried to a jury, while the other issues were tried to the court. Interpleader was proper, although not indispensable, because both Palazzolo's claim against Pan-Atlantic and the latter's claim against Ryan had a common question of fact, namely, was the stow at Georgetown proper and safe.

In concluding this phase of the argument, the respondent respectfully refers to *Westchester Lighting Co.* v. *Westchester S. E. Corp.*, 278 N. Y. 175; *Barris* v. *American Chicle Co.*, 120 F. 2d 218 (Second Circuit); *United States* v. *Arrow Stevedoring Co.*, 175 F. 2d 329 (Ninth Circuit); *Rich* v. *United States*, 177 F. 2d 688 (Second Circuit) and *Crawford* v. *Pope & Talbot, Inc.*, 206 F. 2d 784 (Third Circuit). They uniformly overrule the petitioner's argument about the Longshoremen's and Harbor Workers' Compensation Act, although the first two cited cases actually discussed the New York State Compensation Law, upon which the Federal Act was fashioned. The reasoning of all of the courts is clear. The Circuit Courts of Appeals are in entire agreement that the payment of compensation to an employee cannot have any possible effect upon the independent and different duty or obligation owed by an employer to a third party under contract, expressed or implied.

The principle of common law indemnity which has been applied in this case has been developed and is most frequently applied in cases which are not maritime in character, so any statement that the issue is of peculiar interest to the shipping industry is specious and should not warrant the issuance of a writ of certiorari.

The leading case on this subject of indemnity, recognized as falling in that classification by all courts and text writers, is *Washington Gaslight Co.* v. *District of Columbia*,

161 U. S. 316. Although undoubtedly cognizant of it, the petitioner makes no reference to this famous case, which was decided over fifty years ago. Therein, the plaintiff was under an obligation to maintain, in good order and condition, a certain gas box embedded in a sidewalk in the District of Columbia. The gas box was out of repair, and one Parker stepped into it and was injured. Parker sued the District of Columbia on the theory that a municipal corporation is liable for damages sustained by an individual when caused by an obstruction or defect in the public thoroughfare. Parker had his recovery and, then, the District of Columbia sued the Washington Gaslight Co. for indemnity. It sought to recover the full amount of the judgment which Parker had recovered against the District.

This Court held that the District of Columbia had such a right of recovery on general and well recognized common law principles. In discussing those principles, the Court referred to the fact, at pages 327 and 328, that this common law right of indemnity is not limited to cases involving municipal corporations, but is entirely general in character. The rule had previously been applied to public piers, to the right of a property owner to recover damages which he had been compelled to pay for a defective wire attached by a company to the chimney of his house, to the right of a master to recover over the damages which he had been obliged to pay because of a servant's negligence, and even at that comparatively early date, this Court said:

> "Indeed, the cases which illustrate the rule and its application to many conditions of fact are too numerous for citation, and are collected in the text books."

It is needless to multiply examples of the application of the rule and it should be sufficient to say that the leading case in the Court of Appeals for the Second Circuit is *Burris v. American Chicle Co.* 120 F. 2d 218, which involved a window cleaner who fell from a building, and

the leading case in the Court of Appeals of the State of New York is *Westchester Lighting Co.* v. *Westchester S. E. Corp.*, 278 N. Y. 175, involving the escape of gas from a gas main.

Certainly it is true that our courts have decreed indemnity time and time again where someone has been injured under circumstances amounting to a maritime tort, but, it should be remembered that such indemnity has been given, not because the indemnitee had committed a maritime tort, but, because the defendant against whom indemnity was sought had violated some obligation which it owed to the indemnitee. Examples may be found in *Standard Oil Co. (N. J.)* v. *Robbins Dry Dock & Repair Co.*, 25 F. 2d 339, and 32 F. 2d 182; *Rich* v. *United States and Barber Asphalt Corp.*, 177 F. 2d 688; *Conrao* v. *Waterman Steamship Corporation*, 75 F. Supp. 482; the *S. S. SAMOVAR*, 72 F. Supp. 574; *Seaboard Stevedoring Corp.* v. *Sagadahoc Steamship Co.*, 32 F. 2d 886; *United States* v. *Arrow Stevedoring Co.*, 175 F. 2d 329; *United States* v. *Rothchild International Stevedoring Co.*, 183 F. 2d 181 and *Lundberg* v. *Prudential Steamship Corp.*, 102 F. Supp. 115.

This common law principle, which is so thoroughly a part of our general law, was not originated or developed in the maritime field. Brief reflection upon the underlying equitable principle indicates why the rule of indemnity is of general, rather than special, application. Therefore, it is hardly candid to urge, as the petitioner does here, that the question of indemnity is of any peculiar importance or significance to the "shipping industry." That is manifest when one considers that the basis of the obligation to indemnify is never any maritime tort. It is purely accidental that the cause which gives rise to the *indemnitee's* obligation to an injured person is some event aboard a vessel, rather than an occurrence in a building or in a public thoroughfare or in a means of conveyance on land. The heart of the claim for indemnity is breach of an obligation owed *by the indemnitor* to him who seeks

the indemnity. In the case at bar that obligation is expressed in terms of implied contract, which is one of the most obvious instances for the application of the equitable rule that he who has needlessly caused another to suffer loss, should indemnify for that loss.

It is equally true that the issue of common law indemnity in this case can be of no legitimate importance whatever to that segment of the industry known as "Stevedores" because it is a matter of common knowledge that this case is factually unique, in that the same stevedore loaded and discharged the cargo, the parties are wholly owned subsidiaries of a common parent and the contractual arrangements were informal. Such facts are not to be found duplicated, commonly, in the industry. Finally, it is a matter of further general knowledge that stevedores and steamship owners usually and almost invariably resolve the problem of whose insurance carrier shall pay the loss ultimately, by the terms of the contract pursuant to which vessels are commonly stevedored. There is nothing in this issue of singular applicability to the industry, or even of maritime character, so as to warrant a review of the case by this Court.

The petitioner's failure to recognize the difference between indemnity and contribution permeates the petition, and indicates review here is unnecessary.

Almost any dictionary would define "contribution" as a "giving in common with others", and "indemnity" as a "making good or securing of another's loss." The petitioner attempts to bedevil the obvious distinction by such rhetorical quotations as "indemnity is an extreme form of contribution" (Petition 11, 22) and contribution is "partial indemnity." (Petition 11) As rhetoric the quotations may be sound, but they can form no legal basis for concluding the concepts are identical, as the petitioner has done. (Petition 22) If we refer to the famous words "death is the supreme personal tort," the petitioner would

undoubtedly conclude that all of the principles of law applicable to an action instituted by one for injury during his lifetime would be equally applicable in a death action. Syllogisms using comparatives often result in odd conclusions.

So far as a case of this general type is concerned, contribution could arise only among joint tort feasors. Two or more persons, having damaged the plaintiff pay aliquot shares as among themselves. But there is no contribution among joint tort feasors who have committed a maritime tort against the plaintiff. *Pope & Talbot Inc.* v. *Hawn*, 346 U. S. 406. Indeed, Ryan never committed any tort, maritime or terrene, against Palazzolo. So the petitioner purports to find a "morass and welter of confusion" by citing, quoting and discussing case after case dealing with contribution (which is non-existent).

While indemnity has arisen out of some tort situations in some cases, there is no necessity for a review of that problem in the case at bar, because the indemnity recovered here is predicated only on breach of contract. The action by Pan-Atlantic against Ryan is not based on any maritime tort or anything else maritime. It is simply breach of contract, implied by the law, where one has failed to do the good job for which he has been hired and paid.

The fundamental distinction is uniformly recognized in the Circuit Courts of Appeals. *American Mutual Liability Insurance Co.* v. *Matthews*, 182 F. 2d 322, 323, 324 (Second Circuit); *States S. S. Co.* v. *Rothchild International Stevedoring Co.*, 205 F. 2d 253, 255, 256 (Ninth Circuit); *Crawford* v. *Pope & Talbot Inc.*, 206 F. 2d 784, 792, 793 (Third Circuit). Obviously, there is no conflict in the Circuit Courts of Appeals and review of the pending cause is not necessary.

The petitioner's threat that it and its compensation carrier may try to deprive injured longshoremen of their legal rights in the future, should not warrant the issuance of a writ of certiorari.

33 U. S. C. A. 914 (a) provides that "Compensation under this chapter shall be paid periodically, *promptly*, and directly to the person entitled thereto, *without an award*, except where liability to pay compensation is controverted by the employer." (Emphasis supplied.)

The character of the petition generally may be judged by the threat (Petition 21) that if the petitioner is liable for common law indemnity, the petitioner and its compensation carrier will violate the law, will no longer pay compensation claims to injured workmen promptly but will insist upon a formal award before they will pay an injured man anything. This would result in an assignment of the injured man's claim against a third party allegedly responsible in negligence for having caused the injury. The petitioner says that thus the compensation carrier "would have control over any third party action." It is implicit that, having obtained such control, it would not sue the third party and in this way would prevent any question of indemnity as between the third party and the employer from ever arising. This devious plan to deprive the injured workman of his rights against a third party could never accomplish that result. The petitioner overlooks the fact that when there is a formal award, the compensation carrier becomes a fiduciary or trustee under the law (33 U. S. C. 933 (a), (b), (d), (e)).

The petitioner also forgets that this question of indemnity is of no interest whatever to any legitimate compensation carrier, as such. Where an injured man recovers from a third party, the compensation carrier recoups all of its payments. It receives this reimbursement from the third party and has no further interest in the case, if its sole role is as a compensation insurance carrier. In the case at bar, the compensation carrier has re-

ceived from Pan-Atlantic all payments the carrier had made to or for Palazzolo. It might be expected to participate with Ryan in violating the law in the future, as threatened, only if it has written another kind of insurance for Ryan whereby it will be obliged to pay the judgment for indemnity against Ryan, in whole or in part. A conflicting interest of that type might conceivably tempt some insurance company to endeavor to sacrifice the compensation rights of injured men so that other insurance obligations to others might not have to be paid.

One must view with abhorrence the petitioner's reason for this Court to grant a writ of certiorari being the petitioner's threat in its own behalf and in behalf of its compensation insurance company, in the future to breach the fiduciary relationship imposed upon them by law and to the detriment of injured workmen, in order to safeguard themselves from the liability which the law imposes in indemnity for the benefit of third persons. It should reasonably be anticipated that the first time such a nefarious scheme is essayed, the federal judiciary will brand the conduct fraudulent and take appropriate steps to thwart it.

The decision of the Court of Appeals in this case has not made uncertain in any way the scope of appellate review.

The third reason for review assigned by the petitioner (Petition 12, 13, 25, 26, 27) is just as invalid as the other assigned reasons and arguments. When all the pleadings, interrogatories, motions, testimony at the trial, judge's charge—in short when the whole record—is studied it is seen that the matter between Palazzolo and Pan-Atlantic was reduced to an issue very simply stated. The one and only basic issue in the case was the propriety of the cargo stow at Georgetown. There was no dispute of any fact between Pan-Atlantic and Ryan. The contest at the trial was between Pan-Atlantic and Palazzolo on this question of whether the stow was proper. The jury's verdict in

behalf of Palazzolo established that the stow was not proper. It was admitted that Ryan had actually created the stow, and so the issue for determination by the trial judge was one of law, namely, under these facts now admittedly established, is Pan-Atlantic entitled to indemnity from Ryan. The trial judge committed error in deciding the issue of law and reached the unjustified conclusion of law that the parties were joint tort feasors. The trial judge overlooked the fact that Ryan was not and could not have been a tort feasor. He misconceived, misinterpreted, and in his opinion misstated the legal position taken by Pan-Atlantic.

With the facts established beyond all further question in the fashion indicated, the Circuit Courts of Appeals have always felt they are entirely competent to correct a district judge who has applied the incorrect rule of law to the facts, and this is what the Court of Appeals for the Second Circuit did here.

One need not be concerned over the question of words such as "primary" or "active" or "secondary" or "sole." It simply is the fact that Palazzolo recovered because of an improper stow and Ryan did, in fact, create that stow. Obviously what the Court of Appeals has done in this case is in accordance with accepted, usual and time honored practice. In no sense did the Court of Appeals reverse any finding of fact but rather it applied the proper rule of law to the facts which became undisputed once the jury had spoken.

The decision by the Court of Appeals for the Second Circuit was fair, just and equitable as between Pan-Atlantic and Ryan and should not be reviewed.

At the time of trial the charge to the jury was permeated with the concept of unseaworthiness. This idea was so interwoven with the idea of negligence that the two were inseparable (R. 320, 321, 322, 323). Sometimes it is indeed difficult for one to attempt a unitary concept of the incon-

sistent theories of unseaworthiness and negligence, since the former is a type of liability without fault (*Seas Shipping Co. v. Sieracki*, 328 U. S. 85). But, it often happens, and such is the case here, that the same facts may result in a holding of both negligence and unseaworthiness. It is abundantly clear that if the stowage of the cargo at Georgetown was improper, then, the vessel was obviously unseaworthy as to her stow. Having intermingled the two concepts of negligence and unseaworthiness in charging the jury, the trial judge changed the ground rules when it came time for him to decide the rights of Pan-Atlantic against Ryan. While he jumbled together these two concepts of negligence and unseaworthiness in his charge to the jury on the issue between Palazzolo and Pan-Atlantic, he meticulously separated the two theories when it came time to decide the issue of Pan-Atlantic against Ryan. This was really not fair and constituted a changing of the rules in the middle of the game. This, the Court of Appeals has undone.

It is also the fact that there is supporting the ultimate decision of the Court of Appeals for the Second Circuit an unexpressed but very salutary public policy. It has placed the ultimate burden on the shoulders of the one who is best situated factually to remedy the conditions which caused injury to Palazzolo and to many other workmen.

It is certainly the desire of the law, articulating what is in the public conscience, that the conditions under which longshoremen perform their hazardous work should be as safe as can humanly be achieved. The stevedores do actually control the conditions under which their longshoremen work. Theirs is the opportunity to say whether conditions are reasonably safe or not, whether their men should work under the circumstances, or what additional safeguards may be required, so that longshoremen may perform their tasks in reasonable safety. The stevedore is a specialist in the loading and discharging of cargo and, indeed, it is for that very reason work of this type is

done by stevedoring companies rather than by the ship's personnel. It is an enlightened policy that will impose upon the stevedore the ultimate responsibility, because it is the stevedore's primary right, privilege and opportunity to correct these conditions which lead to the injury of workmen. When stevedoring companies reluctantly conclude that theirs is the prime and fundamental obligation to provide a safe place to work, then, it should be expected that accidents of this character should diminish in frequency.

The "hands off" attitude of the petitioner is typical. It says in effect that it has no obligation, of any kind, nature or description, to see to it that its men work in conditions of safety. For example, at petition 23 and 25, having distorted or misinterpreted the actual testimony, it says the whole obligation rests upon the vessel owner, and it, the stevedore, who has been hired to do a good job, has no responsibility for anything, if it does not do the work in proper fashion, as it has been paid to do. The theme being that Ryan was aloof, practically to the point of indolence, and the cargo really stowed itself, the petitioner seeks to support the stevedore role of bystander, by saying that Pan-Atlantic furnished defective or improper gear to Ryan. The only proof in the record, and that proof was never disputed, was exactly the opposite, namely, there were proper chocks not only aboard the vessel but on the dock at Georgetown where the cargo was lifted (R. 269). The unmasking took place in the Court of Appeals.

Having achieved simple fairness, the Court of Appeals' determination should not be reviewed.

Conclusion

In view of the foregoing a writ of certiorari should not be issued, to which end this brief is respectfully submitted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 11

RYAN STEVEDORING CO., INC.,

Petitioner,

v.

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondent.

RESPONDENT'S OBJECTION TO MOTION BY NATIONAL ASSOCIATION OF STEVEDORES FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* PURSUANT TO RULE 42

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New York 5, New York.

IN THE

Supreme Court of the United States

OCTOBER TERM 1953

No. 157

RYAN STEVEDORING CO., INC.,

Petitioner,

against

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondent.

RESPONDENT'S OBJECTION TO MOTION BY NATIONAL ASSOCIATION OF STEVEDORES FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* PURSUANT TO RULE 42

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now comes the respondent, Pan-Atlantic Steamship Corporation, by its counsel, and respectfully objects to the motion made by the National Association of Stevedores for leave to file a brief as *amicus curiae*, the respondent having withheld its consent to the filing of such brief for the reasons stated herein.

The motion and proposed brief were presumably solicited by the petitioner in order to make this case appear to have

some importance or significance which it actually has not. The brief adds nothing new by way of argument either as to fact or law and constitutes really another brief in behalf of the petitioner, echoing the exact arguments already presented in the petition. Accordingly, the motion does not comply with Rule 42(3) of the Rules of this Court, which requires a demonstration that facts or questions of law have not adequately been presented by the parties.

More than a month before the petition for a writ of certiorari was presented to this Court, and, of course, before the petitioner's brief was filed, the petitioner's counsel requested from the respondent's counsel consent to the filing of a brief in behalf of an unnamed *amicus curiae*. The request for such consent was made by letter dated May 19, 1954. Obviously, the request was made at a time when no prospective *amicus* could possibly comply with the present Rule 42(3) of this Court (formerly Rule 27, par. 9(c)). By letter dated May 21, 1954, counsel for the respondent informed counsel for the petitioner that such consent would not be granted to anyone, because "frankly, I do not see how anyone intending to apply for leave to file a brief *amicus* could possibly make the allegations required by Rule 27, paragraph 9(c)."

By letter dated July 19, 1954, counsel for the National Association of Stevedores requested advices as to whether counsel for the respondent would consent to the filing of a brief *amicus*. By letter of August 4, 1954, with which counsel for the respondent transmitted to counsel for the National Association of Stevedores a copy of the respondent's brief in opposition to the petition for a writ of certiorari, it was pointed out:

> "You will see therefrom we have taken the position that the facts are peculiar and are not in any way typical of the ordinary relationship between shipowner and stevedore. We call your attention to the

fact that the parties here are wholly-owned subsidiaries of a common parent and the contractual arrangements between them were informal and unusual.

If we felt that there was something in the pending case which might classify it as a 'test' case, we would be very pleased to have briefs filed by anyone interested in the subject. We feel that this is a private fight having no effect, directly or indirectly, upon anyone other than the Underwriters for the parties concerned, and therefore we regret that we are not able to consent to your filing a brief."

The motion does not directly challenge the foregoing statement and presents merely a generality that this case has some interest to the "stevedoring industry." Although the respondent's brief was previously furnished to counsel as stated, the motion makes no reference whatever to pages 13, 14, 15 and 16 of the respondent's brief in opposition, wherein it was pointed out in detail that the principle of common law indemnity in this case has been developed and is most frequently applied in cases which are not maritime in character, that the case is factually unique and the only problem in the usual case is whether the stevedore's insurance carrier or the shipowner's insurance carrier will pay the loss ultimately.

Attempted compliance with Rule 42(3) is to be found in a single sentence in the motion, where it has been written "this point of view has not been clearly presented to this Court by the petition for a writ of certiorari herein." The point of view to which reference is made is that the U. S. Longshoremen's and Harbor Workers' Compensation Act is the sole and exclusive remedy of the whole world so far as a stevedore is concerned. Looking to the petition for a writ of certiorari we find this exact point of view presented at pages 2, 7, 8, 9, 10, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25. Further consideration of the

proposed brief shows that the same cases are presented and discussed as those contained in the petition and, in essence, the proposed brief simply echoes the "conduit" theory presented at page 19 of the petition. The fallacy of that theory has been exposed in the respondent's brief in opposition to the petition at pages 11, 12 and 13.

For the foregoing reasons, this objection to the motion should be sustained and the motion should be denied, to which end the objection is

Respectfully submitted,

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Counsel for Respondent.